IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3396 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE D.A.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

GUJARAT SECURITY & GUARDS SERVICES

Versus

OIL & NATURAL GAS CORPORATION LTD

Appearance:

1. Special Civil Application No. 3396 of 2004

MR AK CLERK for Petitioner No. 1-2

MR KJ THAKER for M/S TRIVEDI & GUPTA for Respondent No. 1

MR MUKUL SINHA for Respondent No. 2

MS DHARMISHTA RAVAL for Respondent No. 3

CORAM : HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE D.A.MEHTA

Date of decision: 10/09/2004

C.A.V. JUDGEMENT

(Per : HON'BLE MR.JUSTICE M.S.SHAH)

In this petition under Article 226 of the Constitution, the petitioner has challenged the action of Oil & Natural Gas Corporation Ltd. (hereinafter referred to as "the Corporation" or "the ONGC") rejecting the petitioner's bid and accepting the bid of respondent No.2 in the matter of awarding contract for providing security services to various establishments under the ONGC at Mehsana.

2. The facts leading to filing of this petition, as averred by the petitioner, are as under:-

2.1 The petitioner is engaged in the business of providing security services to various establishments. The petitioner has been providing such services to ONGC from 1993. Presently, the petitioner is providing security services at Mehsana unit of the ONGC. The petitioner is, therefore, well-conversant with the tenders floated by the ONGC and the requirements of such tenders. In the last tender for providing security services for Mehsana unit, the terms and conditions were to the effect that the service tax shall be separately reimbursed to the contractor. However, in the tender floated on 2.12.2003, which is the subject matter of the present petition, it was provided in condition No.2 under heading of Finance BEC as under:-

"The bidders must quote firm percentage service charge strictly in the prescribed Price Format as given in the Tender Document. Except as otherwise specifically provided in the tender document, the bidders shall have to bear all Taxes, Duties, Levies, costs, liabilities and cost of deploying a security manager etc. within their quoted service charges."

In view of the above clause, the petitioner was of the bonafide belief that service tax presently levied at 8% of the gross bill put up by the contractor is also to be included in the service charges and is not to be separately paid by the ONGC to the contractor. The petitioner accordingly submitted its tender.

2.2 The technical bids were opened on 27.1.2004. The petitioner along with three other parties were declared to have qualified in the technical bid. However, before opening the technical bid, the ONGC had held Pre-Bid Conference on 6.1.2004 and at the said conference, the

officers of the ONGC had stated that all taxes including service tax are to be included in the service charge only and no separate payment will be made by the ONGC to the contractor. The petitioner addressed letter dated 15.3.2004 (Annexure "B") to the Executive Director, ONGC, Mehsana asset referring to the stand taken by the ONGC at the Pre-Bid Conference. Similar letters were written by two other bidders on 14.3.2004 and 15.3.2004. Thus, out of the four bidders whose technical bids were found to be valid, three of them were of the bonafide belief that the ONGC had informed at the Pre Bid Conference on 6.1.2004 that service tax was to be included in the service charges of the contractor.

2.3 After opening of the technical bids where four parties including the petitioner were declared to be qualified in the technical bid, the price bids were opened on 11.3.2004. The percentage quoted referred to the percentage of the total salary bill of the staff to be employed as per the tender documents. The price bids quoted were as under:-

Sr. No.	Name of the party	Percentage of service charge quoted.
1.	New Industrial Security Services	13.695%
2.	Gujarat Security & Guards Services (Petitioner)	13.685%
3.	M/s. Gurbani Security Pvt. Ltd..	12%
4.	Industrial Security Services (Respondent No.2)	0.97%

Thus, three parties including the petitioner quoted service charges so as to include 8% service tax, but respondent No.2 quoted service charge at 0.97%.

3. Since the respondent-authorities found the price bid of respondent No.2 at 0.97% as the lowest, the petitioner filed the present petition challenging the apprehended decision of accepting the bid of respondent No.2 on the following grounds:-

(i) The Bid Evaluation Criteria as well as the

clarification given at the Pre-bid Conference on 6.1.2004 made it clear that the bidders were to quote service charge inclusive of all taxes.

(ii) The Assistant Commissioner of Central Excise, Mehsana had stated in his letter dated 22.1.2004 (Annexure "C") that service tax is payable on gross amount charged by the service provider from the customer for such services rendered by him and that the rate of service tax is 8% from 14.5.2003.

(iii) When service tax at 8% of gross salary bill is to be paid by the Contractor out of the service charge, the rate quoted by respondent No.2 at 0.97% is totally unworkable and is impossible to operate. Therefore, the ONGC could not and should not have accepted the price bid of respondent No.2. Respondent No.2, therefore, ought to have been put out of zone of consideration and only the price bids of the three other parties including the petitioner could have been considered.

4. While issuing notice on 18.3.2004, this Court directed that the contract in question shall not be finalised. The said ad-interim relief came to be continued from time to time.

5. In response to the notice issued by this Court, affidavit-in-reply dated 23.4.2004 has been filed by Manager (MM), ONGC at Mehsana contending that the petitioner has conveniently not referred to the other relevant clauses from the bid document and that the said clauses clearly lay down the terms and conditions of the contract. The petitioner has overlooked the relevant provisions in the bid document and has come to an erroneous conclusion. In view of the provisions of the bid document, after evaluation of the bids in light of the said provisions, the rate quoted by respondent No.2 has been found to be the lowest and if at all the rate is unworkable as alleged by the petitioner, it is for the bidder to bear the consequences.

Affidavit-in-reply dated 22.4.2004 has also been filed on behalf of respondent No.2 inviting reference to the relevant provisions of the Model Contract and General Contract Conditions and the bid document.

Affidavit-in-reply dated 7.6.2004 has also been filed by the Assistant Commissioner of Central Excise

Mehsana stating that as per Section 67 of the Finance Act, 1994, the value of any taxable service shall be the gross amount charged by the service provider for such service rendered by him and, therefore, the service tax is payable on the gross amount charged by the service provider from the customer for such services rendered by him and that the rate of service tax from 14.5.2003 is 8%.

6. Before enumerating and dealing with the submissions of the learned counsel for the parties, it is necessary to refer to the relevant documents on record.

On 2.12.2003, the petitioner and other parties had collected a copy of "Tender Document for Hiring of Security Services on Job Contract Basis for Mehsana Asset of ONGC". The Tender Document consists of 18 parts commencing from Tender Notice and Instructions & Guidelines to Bidders and Bid Evaluation Criteria to Model Contract and General Contract Conditions. Reference is made only to those parts of the tender documents which are relevant for the purpose of the present petition.

Clauses 16 and 17 which are important clauses in the Bid Evaluation Criteria, read as under:-

TECHNICAL BEC

16. Contractor shall provide security services by deploying security guards and security manager as per requirement/details contained in the Tender Document.

17. .... ONGC shall reimburse to contractor(s) the Applicable Minimum Wages for 26 days for each workman deployed by it for a month for performing the contracted services and the applicable Employer's EPF contribution @ 12% Administrative Service Charge on EPF @ 1.61%, Workmen Insurance Costs up to 1% of Applicable Minimum Wages, Bonus as per Payment of Bonus Act, 1965, Leave With Wages as per Mines Act, 1952, cost of Kits & Liveries @ Rs.1400/- per head/year as per terms and conditions of the tender, and pay the agreed service charges. ... . ONGC shall not pay any other amounts to the Contractor at any time for any reason whatsoever.

Clause 18 provided that Minimum Applicable Wages

would mean the Minimum Wages made applicable by any authority having jurisdiction from time to time. The present rates of Minimum Applicable Wages as on 1.4.2003 were also mentioned:

Armed security guard = Rs.136.40 (Rs.86.40 + (Semi-skilled) Rs.50.00) per man per day

Unarmed security guard = Rs.135.10 (Rs.85.10 + (Un-skilled) Rs.50.00) per man per day

The Financial Bid Evaluation Criteria (FINANCIAL BEC) contain the following important clauses:-

FINANCIAL BEC

....

2. The Bidders must quote firm %age service charge strictly in the prescribed Price Formats as given in the Tender Document. Except as otherwise specifically provided in the tender document, the Bidders shall have to bear all Taxes, Duties, Levies, costs, liabilities and cost of deploying a Security Manager etc. within their quoted service charges.

3. Ranking of Bidders for each group will be made based on the percentage service charge quoted by them. The bidder quoting the lowest percentage service charges shall be ranked as L-1. If more than one bidder quotes the lowest percentage service charge, the bidder having the highest annual turnover (For Security Contracts only) in the financial year 2002-2003, shall be ranked as L-1 bidder. If there happen to be more than one bider having the same annual turnover (For Security Contracts only) during the financial year 2002-2003 who have all quoted the same lowest percentage service charge & have the same annual turnover in 2002-2003 (For Security Contracts only), the bidder having the highest annual turnover (For Security Contracts only) in the financial year 2001-2002 shall be ranked as L-1.

....

6. The Service Charge should be quoted as %age of Applicable Minimum Wage reimbursable to

the contractor from month to month. The Payment of applicable (sic) shall be restricted to 3.5 man days per day per security point requiring 24 hours manning each day of the month and for a workman the contractor can be reimbursed maximum 26 days applicable minimum wages and associated specified statutory benefits & facilities assuming full manning of the security point on all days of the month.

The important General Criteria laid down were as under:-

GENERAL CRITERIA

....

2. This BEC overrides all other similar clauses operating any where in the Tender document and having a different meaning, if any.

3. Any other point arising at the time of evaluation of the Tender will be decided by ONGC and will be binding on the bidders.

5. Bidders are required to submit their bids strictly in accordance with the instructions, terms & conditions contained in the tender document.

6. No clarification will be sought from the bidders on any point and the bids not complying with the requirements of the tender document on any point may be rejected.

There are various annexures to the Tender Document including Annexure "A" providing for Price Bid Format containing the following note below Table-1 and also below Table-2 :-

"d. Beyond reimbursing the agreed amounts and paying the service charge as mentioned in the BEC, no additional payment would be made by ONGC at any stage on any account whatsoever."

Annexure "C" contain "Model Contract and General Contract Conditions" to be signed by the successful bidder. Clause 7.4 and 8.3 thereof read as under:-

7.0 REMUNERATION AND TERMS OF PAYMENT

7.4 The payment to the contractor would be made by ONGC every month and no supplementary bill would be entertained. ONGC will reimburse wages and other Statutory Payments like PF, Insurance, cost of kits & liveries, Leave with wages, Service Tax etc. if applicable, to the contractor on submission of proof of having paid/deposited/ given the same to its security guards Governmental authorities, Insurance company etc. as applicable. The contractor shall submit documentary evidence in this regard to the entire satisfaction of ONGC. Such statutory payment would be released along with the bill of subsequent month after the contractor submits the necessary documentary evidence of having discharged all its statutory obligations pertaining to contract.

8.0 CLAIMS, TAXES & DUTIES, FEES AND ACCOUNTING:

8.3 TAXES:-

CONTRACTOR, unless specified otherwise in the CONTRACT, shall bear all tax liabilities, duties, Govt. levies etc. including customs duty, Corporate and personnel taxes levied or imposed on the CONTRACTOR on account of payments received by it from the CORPORATION for the work done under this CONTRACT. It shall be the responsibility of the CONTRACTOR to submit to the concerned Indian authorities, the returns and all other concerned documents required for this purpose and to comply in all respects with the requirements of the laws in this regard, in time.

20. CHANGE IN LAW:

In the event of any change or amendment of any Act or law, Rules or Regulations of Govt. of India or Public Body or any change in the interpretation or enforcement of any said Act or law, rules or regulations by Indian Govt. or public body which becomes effective after the date as advised by the ONGC for submission of final price bid for the CONTRACT and will result in increased cost of the works under the CONTRACT through increased liability of taxes, (other than personnel and Corporate taxes), duties, the CONTRACTOR shall be indemnified for any such increased cost by the ONGC subject to the

production of documentary proof to the satisfaction of the ONGC to the extent which is attributable to such change or amendment as mentioned above.

(emphasis supplied)

7. The bone of contention between the parties is that on the one hand the petitioner's case is that in view of clause 17 of the Bid Evaluation Criteria (BEC), the ONGC had held it out to the prospective bidders that ONGC shall not pay any amount to the Contractor at any time for any reason whatsoever other than the amounts mentioned in clause 17 of the BEC. Similar reliance is placed by the petitioner on Note (d) of the Price Bid Format (Annexure "A" to the Tender Document), which reads as under:-

"d. Beyond reimbursing the agreed amounts and paying the service charge as mentioned in the BEC, no additional payment would be made by ONGC at any stage on any account whatsoever."

(emphasis supplied)

On the other hand, it is the case of respondents No.1 and 2 that clause 7.4 in paragraph 7 providing for Remuneration and Terms of Payment in the Model Contract and General Contract Conditions (Annexure "C") clearly provide that the ONGC will reimburse wages and other Statutory Payments like Service Tax etc. if applicable, to the contractor on submission of proof of having paid the same to Governmental authorities. It is submitted that even clause 8.3 of the Model Contract and General Contract Conditions dealing with taxes provided that Contractor, unless specified otherwise in the contract, shall bear all tax liabilities, duties, Govt. levies etc. levied or imposed on the Contractor on account of payments received by it from the ONGC for the work done under the Contract and that it was the responsibility of the Contractor to submit to the concerned authorities, the returns and all other concerned documents required for this purpose and to comply with all legal requirements in this behalf.

8. On behalf of the petitioner, additional contention is also raised by making a reference to the Pre-Bid Conference held on 6.1.2004, reference to which will be made hereinafter. However, on bare perusal of the papers forming part of the Tender Document (Annexure-I to the affidavit-in-reply filed on behalf of

respondent No.2) and on which tender papers there is no dispute, it is clear that the parties intending to submit their bids were required to read all the tender papers and not merely the Technical Bid Evaluation Criteria. The potential bidders were already required by General Criterion No.5 to submit their bids strictly in accordance with the instructions, terms and conditions contained in the Tender Document.

9. The question is whether under the Tender Document the ONGC had agreed to pay service tax as a part of the service charge to be paid to the Contractor or whether service tax was to be separately reimbursed apart from the payment of service charge. Annexure "C" to the Tender Document contains the Model Contract and General Contract conditions and paragraph 7.4 thereof clearly provides that the ONGC will reimburse, inter-alia, service tax, if applicable, to the Contractor on submission of proof of having paid the same to Governmental authorities. The said clause forming part of paragraph "7.0 Remuneration and Terms of Payment" would obviously be one of the most important clauses which cannot be overlooked. Even paragraph 8.3 pertaining to taxes reads as under:-

> "Contractor, unless specified otherwise in the contract, shall bear all tax liabilities ... levied or imposed on the Contractor on account of payments received by it from the Corporation for the work done under the Contract."
>
> (emphasis supplied)

When paragraph 7.4 of the Model Contract specifically provides for payment of service tax by the ONGC, there is no scope for any doubt whether the Contractor is entitled to reimbursement of service tax other than payment of service charge. Even Note (d) in the Price Bid Format used the expression, "Beyond reimbursing the agreed amounts and paying the service charge as mentioned in the BEC, no additional payment would be made by ONGC at any stage on any account whatsoever". Clause (2) of the Financial BEC also specifically states as under :-

> "2. The Bidders must quote firm %age service charge strictly in the prescribed Price Formats as given in the Tender Document. Except as otherwise specifically provided in the tender document, the Bidders shall have to bear all

Taxes, Duties, Levies, costs, liabilities and cost of deploying a Security Manager etc. within their quoted service charges."

(emphasis supplied)

Since the Model Contract at Annexure "C" to the Tender Document is as much a part of the tender document as "the Bid Evaluation Criteria" is, the terms of clause 7.4 of the Model Contract have to be read as incorporated in clause (2) of the Financial BEC.

10. As regards the contention of the learned counsel for the petitioner that clause 17 of the Bid Evaluation Criteria provided that no amount is to be paid by the ONGC to the Contractor other than the amounts mentioned in clause 17, the contention overlooks that clause 17 only deals with the payments to be made by the ONGC to the Contractor such as Employees PF contribution, Administrative service charge thereon, Workmen Insurance costs, Bonus, Leave with wages, Minimum wages etc.. The last sentence in clause 17 has, therefore, to be read ejusdem generis and so read it is clear that clause 17 does not purport to exhaust payments by ONGC to the Contractor but it only covers within its sweep reimbursement of all payments to be made by the Contractor to its workers. There is no clause in the Technical BEC or the Financial BEC expressly ruling out reimbursement of service tax. Hence clause 7.4 in the Model Contract which is at Annexure "C" to the Tender Document cannot be overlooked because clause (2) in the Financial BEC specifically contains the words, "Except as otherwise specifically provided in the Tender Document, the Bidders shall have to bear all taxes etc. within their quoted service charges".

11. The learned counsel for the petitioner has tried to submit that in view of the doubt whether service tax is to be included in the service charges or not, specific clarifications were sought for at the Pre-Bid Conference held on 6.1.2004. In this connection, reference is also made to the minutes of the Pre-Bid conference which minutes were produced at the hearing before the Court. Having perused those minutes, we find that queries were raised about the ambit of the service tax whether it would be applicable on the gross amount to be paid by the ONGC to the Contractor including the payments of wages and other benefits to the workers or whether the service tax would only be payable on the net service charge collected by the Contractor. The queries raised at the Pre-Bid Conference were as under:-

Query No.1: Service Tax

Query No.2: Submission of Tender in Tender Annexure only or should it be filled in as per Proforma given in Tender on Bidder's Letterhead Pad.

Query No.3: Whether Statutory Obligation may be clubbed together with Minimum Wages to reduce Paper work.

Query No.4: Deduction of TDS on Minimum Wages or Statutory Obligations also.

We do not find that the doubt sought to be raised at the hearing of the petition was raised before the authorities.

12. In any view of the matter, having heard the learned counsel for the parties at length, we are of the view that even if the bids offered by the four parties are evaluated in such a manner that the bids offered by the petitioner and two other parties are considered after deducting service tax at 8%, the net service charge quoted by the petitioner and two other parties would still work out to 5.685% (petitioner), 5.695% (New Industrial Security Services) and 4% (M/s. Gurbani Security Pvt. Ltd.). As against that, the net service charge quoted by respondent No.2 is 0.97%. Thus, the rate quoted by respondent No.2 is the lowest in any view of the matter and, therefore also, no fault can be found with the decision of the authorities in deciding to accept the tender of respondent No.2

13. In view of the above discussion, the petition deserves to be dismissed and is accordingly dismissed.

Notice is discharged with no order as to costs.

Ad-interim relief granted earlier stands vacated.

(M.S. SHAH, J.)

(D.A. MEHTA, J.)

zgs/-

10.09.2004.

14. At this stage, Mr AK Clerk, learned counsel for the petitioner prays that the ad-interim relief granted earlier may be extended for four weeks to enable the

petitioner to have further recourse in accordance with law.

Mr Thaker for the ONGC and Mr Mukul Sinha for respondent No.2 oppose the request and submit that the previous contract had come to an end in March 2004 and it is only on account of the ad-interim relief that the previous arrangement had to be continued on ad-hoc basis.

In the facts and circumstances of the case, we do not see any reason to continue the ad-interim relief.

(M.S. SHAH, J.)

(D.A. MEHTA, J.)
zgs/-